ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 31 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 98-102

COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND BELLSOUTH WIRELESS CABLE, INC.

William B. Barfield
Thompson T. Rawls, II
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 335-0764

Their Attorneys

July 31, 1998

No. of Copies rec'd 0+4
List ABCDE

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 98-102
	)	

Directed to: The Commission

COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND BELLSOUTH WIRELESS CABLE, INC.

BellSouth Corporation and its subsidiaries BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"), by their attorneys, hereby file their comments with respect to the FCC's *Notice of Inquiry* (the "*NOI*") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

In the Commission's 1997 Annual Report to Congress on the status of competition in markets for delivery of video programming, Chairman Kennard observed that "less than 15 months away from the sunset of most cable rate regulation, it is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent."[1] At

---

[1] Separate Statement of Chairman William E. Kennard re: *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 1034, 1238 (1998) [the "Kennard Statement"].

least with respect to an increasing number of its own markets, BellSouth is pleased to report that the Chairman's goal of full and fair competition will soon be realized *if* the Commission acts now to eliminate or modify rules and policies that continue to impede entry by alternative multichannel video programming distributors ("MVPDs").

In its comments on the 1997 Annual Report, BellSouth stated that it was pursuing an aggressive strategy of deploying wired and wireless multichannel video technologies throughout its service area in direct competition with incumbent cable operators. At that time, BellSouth had already obtained cable franchises in 17 communities in Alabama, Florida, Georgia, South Carolina and Tennessee, representing a potential total of almost 1.2 million cable households.[2/] BellSouth also had entered into or completed agreements to acquire MDS and ITFS channel rights covering 3.5 million homes in and around several large markets in Florida, and in Atlanta, New Orleans and Louisville.[3/] BellSouth reported that it was scheduled to launch digital wireless cable service initially in New Orleans and Atlanta, with Jacksonville, Daytona Beach, Orlando, Miami and Louisville to follow.[4/]

Just one year later, BellSouth is providing consumers with their first broad-based choice of multichannel video providers in many of the communities mentioned above. BellSouth has launched competitive cable overbuild service in Vestavia Hills, Alabama;

[2/] Comments of BellSouth Corporation *et al.*, CS Docket No. 97-141, at 6-7 (filed July 23, 1997) [the "BellSouth Annual Inquiry Comments"].

[3/] *Id.*

[4/] *Id.*

Chamblee, Lawrenceville, Cherokee County, DeKalb County, Gwinnett County and Duluth, Georgia; St. Johns' County, Florida; and Daniel Island, South Carolina. In addition, BellSouth is currently in negotiations to obtain cable franchises to serve communities in and around these and other metropolitan areas.

BellSouth also has launched digital wireless cable service in New Orleans (approximately 400,000 line-of-sight households) and Atlanta (approximately 900,000 line-of-sight households), and is scheduled to launch similar service in Orlando, Daytona Beach, Jacksonville, Miami and Louisville over the next two years. In Atlanta, for example, BellSouth's wireless system offers 160 channels (including 30 audio channels) of digital service in direct competition with cable MSOs MediaOne Group, Time Warner and Comcast.[5] To date, BellSouth has invested hundreds of millions of dollars to acquire wireless cable channel rights, deploy transmission and reception equipment, establish the operational infrastructure necessary to develop competitive digital wired and wireless cable systems, and provide distance learning opportunities for local ITFS licensees.

Despite this level of commitment and expertise, neither BellSouth nor any other alternative MVPD can expect to compete on equal footing with incumbent cable operators unless the regulatory environment changes. In this regard, BellSouth applauds the

---

[5] *See* "Wireless Crossroads: Digital, Data and Telephony," *Cable World*, at 93 (June 29, 1998). The service includes local broadcast stations plus basic and premium cable networks. Pay-per-view movies are offered on a stand-alone basis through BellSouth's Express Cinema service. Express Cinema delivers 50 pay-per-view channels, which can be ordered from an interactive on-screen-guide. Movies typically cost $3.99 each. *See* Schofield, "Rolling Out Digital Wireless Cable," *Wireless Voice Video Data*, at 27 (May/June, 1998).

Commission's decision to give high priority to the critical issue of program access, and looks forward to resolution of the Commission's pending proposals to streamline its program access complaint procedures and clarify that satellite-to-fiber migration of programming constitutes an actionable violation of the program access rules.[6/] Yet even that significant first step will not provide alternative MVPDs full and fair access to programming *as long as the existing program access statute applies only to "vertically-integrated" programming delivered via satellite, and is interpreted by the Commission to allow programmers to offer discriminatory volume discounts to incumbent cable operators.*[7/]

As already acknowledged by the Commission, "vertically integrated" cable networks constitute only 40% of those networks available in the marketplace, and the cable industry's long-anticipated evasion of the program access rules via fiber delivery has now become a reality. The Commission's current interpretation of the existing statute also appears to allow programmers to provide steep volume discounts that are available only to the largest incumbent cable operators that do not compete with each other, even where such discounts

---

[6/] *Implementation of the Cable Consumer Protection and Competition Act of 1992*, 12 FCC Rcd. 22840 (1997) [the "*Program Access NPRM*"]. Resolution of this item is currently scheduled for the Commission's open meeting on August 6, 1998. *See* "FCC to Hold Open Commission Meeting, Thursday, August 6, 1998" (FCC Public Notice, rel. July 30, 1998).

[7/] Just prior to the filing of these comments, House Telecommunications Subcommittee Chairman Billy Tauzin and Congressman Edward J. Markey introduced legislation that would eliminate the "vertical integration" and "terrestrial delivery" loopholes from the program access statute. *See* Remarks of U.S. Representative Edward J. Markey, *<http://www.house.gov/markey/pr__vcccact.htm>* (July 29, 1998). For the reasons set forth herein, BellSouth supports that legislation and urges that it be incorporated into the Commission's recommendations to Congress on program access matters.

plainly are designed to thwart competition from new video providers. Congress clearly did not anticipate these scenarios when it adopted the program access provisions of the 1992 Cable Act. Accordingly, the Commission should recommend that Congress amend the program access statute to clearly and unequivocally eliminate these loopholes and provide alternative MVPDs with relief from the volume discount problem discussed herein.

BellSouth further submits that the prospects for full-fledged competition will improve if Congress revises its current procedures for reviewing and approving applications for new or modified MDS and ITFS facilities. The Commission's current procedures require the Mass Media Bureau's staff to initiate a duplicative and often extremely time-consuming "soup to nuts" engineering review of literally thousands of MDS or ITFS applications, creating processing backlogs that delay wireless cable service and thus work to the decided disadvantage of consumers by forestalling competition from new entrants. BellSouth thus urges the Commission to adopt the streamlined MDS/ITFS application procedures recently proposed by the wireless cable industry in MM Docket No. 97-217,[8] subject to the refinements suggested in BellSouth's Reply Comments in that proceeding. In addition, to further alleviate the processing burden on the FCC's staff, the Commission also should explore the possibility of using a pre-certification type of procedure for MDS/ITFS engineering analyses conducted by FCC-approved private engineering firms.

---

[8] *Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions*, 12 FCC Rcd. 22174 (1997) [the "*Two-Way NPRM*"].

Finally, it has become clear that Congress's adoption of the open video systems or "OVS" model for multichannel video providers has generated relatively little enthusiasm within the telephone industry, or among cable system operators or others that might be interested in converting to the OVS mode of operation. In BellSouth's view, this in large part is due to the fact that the OVS statute currently requires an OVS provider to operate much like a cable operator but also make two-thirds of its channel capacity available to unaffiliated programmers. Simply stated, there is very little economic upside to operating a multichannel video system in this manner, and thus BellSouth believes that the OVS model will continue to remain unattractive absent a substantial relaxation of the "two-thirds" channel availability requirement. Hence, for the reasons set forth herein, BellSouth urges the Commission to recommend that Congress limit an OVS provider's "nondiscriminatory" channel availability obligations to the same amount of system capacity cable operators are required to make available to unaffiliated programmers under the 1984 Cable Act's commercial leased access requirements.

II. DISCUSSION.

A. Full And Fair Access To Programming Cannot Be Achieved Unless The Program Access Statute Is Amended To Address Current Marketplace Realities.

1. The Program Access Statute Should Be Amended To Apply To All Video Programming Services, Regardless Of The Method Of Delivery Or Affiliation.

Clearly, the Commission understands that program access continues to be a cornerstone issue for cable's competitors.[9] Indeed, the Commission's strong commitment to meaningful program access reform is reflected in the *Program Access NPRM*, in which the Commission proposes to eliminate procedural loopholes that give programmers incentives to delay selling their product to cable's competitors for as long as possible. In that same proceeding, the Commission has also sought comment on the equally significant question of whether a programmer's evasion of its program access obligations via migration of programming from satellite to fiber constitutes an actionable violation of the Commission's program access rules. BellSouth strongly supports the Commission's efforts to resolve the *Program Access NPRM* in

---

[9] *See, e.g.,* Statement of John E. Logan, Acting Chief, Cable Services Bureau, Federal Communications Commission, Before the United States Senate Subcommittee on Communications, Committee on Commerce, Science, and Transportation, re: Cable Services Bureau Oversight, 1998 FCC LEXIS 2660, at *8-9 (June 4, 1998) ["The program access rules provide an important means of enabling the Cable Services Bureau to promote competition in the multichannel video programming marketplace. Indeed, they have been credited as an important factor in the development of both the direct broadcast satellite and wireless cable industries."] [the "Logan Statement"].

the near term,[10/] and urges the Commission to do so in accordance with BellSouth's recommendations therein.[11/]

Unfortunately, however, the Commission's program access objectives will remain elusive unless the governing program access statute (Section 628(c) of the 1992 Cable Act) is amended to eliminate language that is being relied upon to arguably *exempt* most cable networks from any program access obligations whatsoever. As currently written, Section 628(c) applies only to those "satellite cable programming vendors" which are "vertically-integrated," *i.e.*, those in which a cable operator has "an attributable interest."[12/] Yet in its 1997 Annual Report to Congress, the Commission found that of the 172 national satellite-delivered cable programming services, 104, or 60%, are *not* "vertically integrated" and thus fall outside the scope of the program access statute.[13/] There is no evidence whatsoever that Congress enacted the statute with

---

[10/] *See* Logan Statement at *9 (stating that the Commission expects to resolve the *Program Access NPRM* "within the next several months").

[11/] As set forth in BellSouth's comments on the *Program Access NPRM*, BellSouth has recommended, *inter alia*, that the Commission (1) adopt a rule specifying that a staff decision on program access complaints must be rendered within 45 days of the close of the official pleading cycle; (2) give all program access complainants a right to discovery of certain specific programming documentation; (3) provide all program access complainants with a damages remedy; and (4) declare that satellite-to-fiber migration of programming is an "unfair practice" under Section 628(b) of the 1992 Cable Act, where such practice has the "purpose or effect" of hindering or preventing an MVPD from delivering that same programming to its subscribers. *See* Comments of BellSouth Corporation *et al.*, CS Docket No. 97-248 (filed Feb. 2, 1998) [the "BellSouth Program Access NPRM Comments"].

[12/] 47 U.S.C. § 548(c)(2).

[13/] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video* Programming, 13 FCC Rcd. 1034, 1122 (1998) [the "*Fourth Annual Report*"]. As recognized by (continued...)

this absurd result in mind, and indeed the Commission itself has recognized that "vertical integration" is not the root of the program access problem. In a recent statement to Congress, the Commission confirmed that the program access analysis "should focus on the source of any market power involved (the absence of competition at the local distribution level) *rather than on vertical integration itself.*"[14]

Furthermore, recent developments involving ESPN's Classic Sports Network ("CSN") and MSNBC demonstrate why the statute's regulation of "vertically integrated" services is no longer sufficient to ensure that alternative MVPDs have full and fair access to programming. As reflected in a program access complaint filed earlier this month by cable overbuilder Ameritech New Media, Inc. ("Ameritech"), CSN and Ameritech currently have a non-exclusive affiliation agreement under which CSN is carried on Ameritech systems serving over 100,000 subscribers in Michigan and Illinois.[15] Ameritech's complaint reflects that Ameritech has promoted CSN extensively, and that the service has become very popular among Ameritech's

---

[13] (...continued)
the Commission, a number of these services have refused to deal with alternative MVPDs. Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 1 (Jan. 23, 1998) [identifying Fox News, MSNBC, Game Show Network, Eye on People, Home & Garden Television and TV Land as services that do not sell to alternative MVPDs] [the "Kennard Letter"]. *See also* BellSouth Fourth Annual Inquiry Comments at 12-13 (noting that BellSouth has been unable to obtain access to TV Land, Fox News and MSNBC); *Fourth Annual Report*, Table F-2, 13 FCC Rcd. at 1217 ("nonvertically-integrated" services now also include MTV, VH1, Nickelodeon, ESPN and ESPN2 and Showtime).

[14] Kennard Letter, Responses to Questions at 3 (emphasis added).

[15] *Ameritech New Media, Inc. v. MediaOne, Inc. And Time Warner Cable*, CSR-5273-P, at 5-7 (filed July 1, 1998) [the "Ameritech Complaint"].

subscribers.[16] Nonetheless, Ameritech has received notice that it will no longer be permitted to carry CSN upon expiration of the CSN/Ameritech agreement at the end of this year.[17] Instead, by virtue of exclusive contracts between CSN and cable MSOs MediaOne and Time Warner, CSN will be carried exclusively by the incumbent cable operators *with which Ameritech competes.*[18] BellSouth is encountering similar problems with CSN where BellSouth competes with MediaOne for video customers.[19] The statute's "vertical integration" requirement encourages this sort of blatantly anticompetitive conduct: CSN is owned by the Walt Disney Company, and the defendant MSOs have seized upon this fact to argue that CSN is not "vertically integrated" and thus is free to enter into exclusive contracts with incumbent cable operators, even those which cause direct and immediate harm to a competing MVPD.[20]

It is also well known that MSNBC refuses to deal with wireless cable operators on the theory that it is owned in equal part by Microsoft and NBC, and thus is not covered by the statute. Again, the genesis of this claim is the statute's "vertical integration" requirement. As currently defined by the Commission, "vertical integration" is defined solely in terms of a cable

---

[16] *Id.*

[17] *Id.* at 9.

[18] *Id.*

[19] In addition, BellSouth's experience in New Orleans reflects that the unwillingness of programmers to sell to cable's competitors extends even to local television stations. BellSouth Fourth Annual Inquiry Comments at 13-14.

[20] Time Warner recently indicated that it does not intend to enforce its exclusive right to carry CSN in Ameritech's markets. Hearn, "Time Warner Yields on Access Complaint," *Multichannel News*, at 3 (July 6, 1998). MediaOne, however, has indicated otherwise. *Id.*

operator's ownership interest in a programmer. It does not explicitly cover situations where a programmer (*e.g.*, Microsoft) holds a substantial ownership interest in a cable operator (*e.g.*, Microsoft's $1 billion, 11.5% non-voting interest in Comcast), even though the programmer's incentive to discriminate against alternative MVPDs is the same in either situation.[21] This loophole has enabled MSNBC to contend that it is not "vertically integrated" and, not coincidentally, MSNBC remains unavailable to alternative MVPDs to this day. Obviously, Congress never intended to promote such an absurd result. Moreover, since the Commission retains full discretion to define "vertical integration" as it sees fit, it can eliminate this problem simply by amending Section 76.1000 of its rules to clarify that Microsoft's investment in Comcast is "attributable," that Microsoft thus qualifies as a "cable operator" under the rule, and that MSNBC therefore is a cable network in which a "cable operator" holds an attributable interest. Such a clarification would be unnecessary, however, if the "vertical integration" requirement in the governing statute were eliminated altogether.

Finally, BellSouth once again urges that the program access statute be amended so that it applies regardless of how video programming is delivered to cable operators for retransmission to subscribers.[22] Currently, the statute applies to "satellite cable programming," defined as video programming which is transmitted via satellite and which is primarily intended for the direct

---

[21] *See* 47 C.F.R. § 76.1000(b).

[22] *See* BellSouth Fourth Annual Inquiry Comments at 14-16 (requesting that the Commission ask Congress to close the "fiber loophole" in the program access statute).

receipt by cable operators for their retransmission to subscribers.[23] As a result, alternative MVPDs have long been concerned that programmers would evade their program access obligations by migrating programming, and particularly popular regional sports programming, from satellite to fiber delivery.[24] In fact, the Commission itself recently acknowledged to Congress that "regardless of the method of delivery, where programming is unfairly or anticompetitively withheld from distribution, competition is deterred or impeded."[25] Further, migration of regional sports programming from satellite to fiber has become a reality in the Philadelphia market, and at least one alternative MVPD has been denied access to programming on that basis.[26] Similar use of fiber for the purpose of evading program access requirements has become a reality in the New York tri-state area as well, and the Commission has recognized that other markets soon may follow.[27]

---

[23] *See* 47 U.S.C. §§ 548(i)(1), 605(d)(1).

[24] *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 9 FCC Rcd 7442, 7531 (1994) [noting Liberty Cable's prediction that "unless corrected, the problem [of evasion of program access protections through terrestrial distribution] will grow in the future because vertically integrated programming vendors will have the incentive to modify the distribution of their programming, using fiber optics or other non-satellite means, in order to evade application of the program access requirements."]; BellSouth Fourth Annual Inquiry Comments at 14-15 (discussing prior Commission recognition of the "fiber evasion").

[25] Kennard Letter, Responses to Questions at 7.

[26] *See, e.g.,* BellSouth Program Access NPRM Comments at 20-21 (discussing creation of Comcast SportsNet, a fiber-delivered regional sports network featuring programming formerly delivered by satellite).

[27] *See* Umstead & Forkan, "Rainbow Keeps New Services Exclusive," *Multichannel News,*
(continued...)

The cable industry's only defense for this practice is its contention that the statute by its terms only applies to satellite-delivered cable networks, and that any service delivered via fiber is not subject to program access obligations.[28] For the reasons set forth in BellSouth's comments on the *Program Access NPRM,* BellSouth submits that this argument is wrong, and that the Commission can and should declare that such conduct is an "unfair practice" under the statute and thus constitutes an actionable program access violation.[29] If, however, the Commission still believes that the statute does not afford it sufficient latitude on this issue, any ambiguity can be eliminated simply by recommending that Congress amend the statute so that it applies to all video programming regardless of the method of delivery, thereby closing the "fiber loophole" once and for all.

In sum, the above-described examples of recent anticompetitive cable programmer behavior, combined with the Commission's express recognition that market power, not vertical integration, is the linchpin of the program access problem, reflect the simple fact that the

---

[27] (...continued)
at 1 (July 6, 1998) [discussing Rainbow Media Holdings' launch of cable-exclusive regional channels via fiber in the New York tri-state area]; Kennard Letter, Response to Questions at 6 ["Programming that is used by a single system or group of interconnected systems is typically distributed terrestrially. . . [T]here . . . has been a trend toward a greater linkage of cable systems in regional clusters through fiber optic connections which are now much more generally available. These facilities, once in place, would typically have the capacity to distribute a number of channels of service."].

[28] *See, e.g.,* Comments of Comcast Cablevision, CS Docket No. 97-248, at 8-10 (filed Feb. 2, 1998).

[29] *See* BellSouth Program Access NPRM Comments at 19-25.

program access protections in the 1992 Cable Act are no longer adequate in light of the dramatic transformation of the marketplace over the past six years. Congress did, however, give the Commission authority to take remedial action to address changed circumstances.[30/] For the reasons discussed above, BellSouth urges the Commission to more fully utilize that authority and recommend that the program access statute be amended so that it applies to all video programming, regardless of its affiliation or its method of delivery.

2. *The FCC Should Interpret Its Rules And Make Whatever Legislative Recommendations Are Necessary To Prevent Programmers From Awarding Discriminatory Volume Discounts To Large Cable MSOs.*

BellSouth's experience over the past year confirms that cable programmers continue to impede full and fair competition by offering steep volume discounts exclusively to large incumbent cable operators.[31/] In a similar vein, the Small Cable Business Association has pointed out that its members have been unable to obtain comparable discounts even where

---

[30/] *See* 1992 Cable Act Conference Report, H.R. Rep. 102-862, 102d Cong., 2d Sess. at 93 (1992) ["In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory rates to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies by providing facilities-based competition to cable and extending programming to areas not served by cable."].

[31/] *See, e.g.,* "Wireless Ops Turn to Internet Access," <*http://www.multichannel.com*> (July 15, 1998) [quoting wireless cable trade association president as saying that wireless cable operators are "getting really hurt on the program-access price-discrimination issue, and Congress is not doing anything about it"].

they have consolidated into buying groups nearly as large as the biggest cable MSOs.[32] While such discounts might represent a legitimate business strategy in a fully competitive environment, at present they are available only to cable MSOs *that do not compete with each other.* As a result, the cable programmers' practice of awarding steep volume discounts only to the largest MSOs establishes a barrier to entry and inhibits the development of *bona fide* competition between cable MSOs and alternative MVPDs.

As in the case of "vertical integration" and satellite-to-fiber migration, the volume discount pricing problem to a large extent is attributable to how the program access statute is currently written. Section 628(c)(2)(B)(iii) of the 1992 Cable Act permits a cable programmer to charge different prices to different MVPDs based on, *inter alia*, "economies of scale, cost savings, *or other direct and legitimate economic benefits* reasonably attributable to the number of subscribers served by the distributor."[33] In BellSouth's view, the phrase "other direct and legitimate economic benefits" is too broad, since it enables a programmer to offer, and a large cable MSO to demand, a steep discount based on vaguely defined economic factors unrelated to the specific cost savings or economies of scale arising from the transaction. Indeed, various economic factors conceivably could qualify as a "direct and

[32] *See, e.g,* Comments of the Small Cable Business Association, CS Docket No. 97-248, at 2 (filed Feb. 2, 1998) [noting that a small, independent operator typically pays 50% to 100% more for programming than the large cable MSOs, and that even the small cable buying group (the National Cable Television Cooperative) pays up to 40% more for programming than TCI or Time Warner].

[33] 47 U.S.C. § 548(c)(2)(B)(iii) (emphasis added).

legitimate economic benefit" of a volume discount, even though the effect of those discounts is to hinder significantly or prevent MVPDs from providing the same programming because of substantially higher cost. This could not have been what Congress intended in giving cable programmers a limited right to offer different prices to competing MVPDs.

The Commission should attack this problem either by requiring strict justification of such discounts and narrowing its interpretation of what qualifies as "other direct and legitimate economic benefits" under Section 628(c)(2)(B)(iii) of the 1992 Cable Act, or by asking Congress to clarify that this language is intended to require programming vendors to cost-justify any volume discounts where they are made available only to the largest cable MSOs that do not compete with each other. Given the clear pro-competitive objectives of the program access statute, and that the need for reform on the issue of price discrimination remains as compelling as ever, BellSouth believes that it is both appropriate and necessary for the Commission to ask Congress to so refine Section 628(c).

B. MDS And ITFS Licensing Reform Is Necessary To Maximize The Competitive Potential Of Wireless Cable Operators.

As a general matter, BellSouth fully supports the Commission's renewed commitment to streamlining its licensing procedures to ensure that new services and technologies are available to the public as quickly as possible.[34] Consistent with that objective, the

---

[34] *See, e.g.,* Statement of Chairman William E. Kennard Before the United States Senate Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, on the Reauthorization of the Federal Communications Commission, 1998 FCC LEXIS 2760, at *25 (June 10, 1998) ["[I]t is essential that the FCC look carefully at its rules and (continued...)

Commission has initiated a series of rulemakings in which it proposes to eliminate application processing requirements that often delay the launch of competitive services for extended periods of time. For example, the Commission has proposed to revise and shorten its mass media application forms and eliminate various rules that place unwarranted filing burdens on applicants for new or modified broadcast stations;[35/] extend first-come first-served processing to AM, noncommercial FM, and FM translator minor change applications;[36/] consolidate and streamline application procedures and databases for various wireless telecommunications services;[37/] and simplify the equipment authorization process and deregulate authorization requirements for certain types of equipment.[38/]

[34/] (...continued)
internal organization and procedures to ensure that its rules and operations are as streamlined as possible. We must do so to eliminate unnecessary burdens on the industries we regulate and to make sure that the Commission is operating as effectively and efficiently as possible."] [the "Kennard Testimony"].

[35/] *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes*, MM Docket No. 98-43, FCC 98-57 (rel. April 3, 1998).

[36/] *1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, MM Docket No. 98-93, FCC 98-117 (rel. June 15, 1998).

[37/] *Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, WT Docket No. 98-20, FCC 98-25 (rel. March 18, 1998).

[38/] *Amendment of Parts 2, 15, 18 and Other Parts of the Commission's Rules to Simplify and Streamline the Equipment Authorization Process for Radio Frequency Equipment*, ET Docket No. 97-94, FCC 98-58 (rel. April 16, 1998) [the "*Equipment Authorization Report and Order*"].

As an alternative MVPD that has committed substantial financial, technical and human resources toward launching the first digital wireless cable service in several major markets throughout the southeastern United States, BellSouth believes that the Commission must give similar consideration to streamlining its MDS and ITFS licensing procedures, with the ultimate goal of eliminating the lengthy application processing delays that have hampered wireless cable operators for a number of years.[39] In BellSouth's view, these processing delays are largely attributable to the fact that the Mass Media Bureau's staff must undertake a *de novo* engineering review of each and every application for new or modified MDS or ITFS facilities, even where any potential interference concerns have already been eliminated via private frequency coordination.[40] Though the Mass Media Bureau has worked very hard to provide prompt responses, it is easy to understand why many pending MDS and ITFS

---

[39] *See* Reply Comments of BellSouth Corporation and BellSouth Wireless Cable, Inc., MM Docket No. 97-217, at 17 n.50 (filed Feb. 9, 1998) [the "BellSouth Two-Way Reply Comments"]. *See also* Joint Statement of Position of the National ITFS Association, Inc. and The Wireless Cable Association International, Inc. re: MM Docket No. 97-217, at 3 (Feb. 8, 1998) [urging the Commission to "adopt rules providing for the expedited processing and automatic grant of applications to introduce advanced technologies on MDS and ITFS channels"]; Comments of Joint Wireless Cable and ITFS Petitioners, MM Docket No. 97-217, at 15-16 (filed Jan. 8, 1998) [suggesting that unless the Commission makes substantial changes to its application procedures, the resulting backlog will seriously hamper wireless cable operators and their much needed financial and operational support of local educators].

[40] *Compare, e.g.*, 47 C.F.R. § 101.31(e) (permitting an applicant for a new or modified point-to-point microwave station to operate its proposed station upon the filing of a properly completed, frequency-coordinated application). *See also Equipment Authorization Report and Order* at ¶¶ 40-44 (extending self-approval procedures to Part 15 and Part 18 devices); *1998 Biennial Regulatory Review -- Amendment of Parts 2, 25 and 68 of the Commission's Rules to Further Streamline the Equipment Authorization Process for Radio Frequency Equipment*, GEN Docket No. 98-68, FCC 98-92 (rel. May 18, 1998) [proposing to provide the option of private sector approval of telephone terminal equipment that currently requires approval by the Commission].

applications cannot be granted quickly. Such delays inevitably forestall the launch of competitive wireless cable service, a scenario that in no respect serves the best interests of consumers.

Accordingly, at a minimum, BellSouth urges the Commission to adopt the streamlined application processing rules proposed by the joint wireless cable and ITFS Petitioners in connection with the Commission's *Two-Way NPRM*, subject to the refinements proposed in BellSouth's Reply Comments in that proceeding.[41] The Petitioners' proposal of one-day filing windows and automatic grants, modified to incorporate expedited interference resolution procedures, represents a much-improved system that would work to the benefit of MDS/ITFS licensees, wireless cable operators and, more importantly, the public. The Commission should also explore the feasibility of using a pre-certification type of procedure for MDS/ITFS engineering analyses conducted by FCC-approved private engineering firms, which BellSouth believes should be adopted as an additional vehicle for expediting the FCC review process and reducing the administrative burden on the FCC's own engineering staff. If implemented in the near term, these reforms would expedite introduction of advanced distance learning services and commercial wireless cable services, a result that is perfectly consistent with the Commission's broader pro-competitive agenda for all Commission-licensed services.

---

[41] *See* BellSouth Two-Way Reply Comments at 16-21.

C. *The Commission Should Create Incentives For MVPDs To Convert To The OVS Mode of Operation, Principally By Recommending That Congress Relax The Requirement That OVS Operators Make Two-Thirds Of Their Channel Capacity Available To Unaffiliated Programmers.*

Primarily to promote telco entry into the MVPD marketplace, the 1996 Telecom Act established a new regulatory model - - the "open video system" or "OVS".[42] The Commission has described OVS as follows:

> As designed by Congress, the open video framework provides an option, particularly to a local exchange carrier, for the distribution of video programming other than as a "cable system" governed by all of the provisions of Title VI. If a telephone company agrees to permit carriage of affiliated video programming providers on just, reasonable and nondiscriminatory rates and terms, it can be certified as an operator of an "open video system" and subjected to streamlined regulation under Title VI.[43]

BellSouth believes that with one important change, it could agree with the Commission's statement that "the open video system model can provide the competitive benefits that Congress sought to achieve: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice."[44] The fact remains, however, that the competitive possibilities of OVS largely remain unexplored. Indeed, notwithstanding the fact that an OVS may be operated

---

[42] 47 U.S.C. § 653.

[43] *Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 18223 (1996) [the "*OVS Second R&O*"].

[44] *OVS Second R&O*, 11 FCC Rcd. at 18224.

without a local cable franchise,[45] BellSouth and most other local exchange carriers have opted to deploy franchised cable service in lieu of the OVS model.[46]

From BellSouth's perspective, the impracticality of the OVS model is rooted in the statutory requirement that an OVS operator make up to two-thirds of its channel capacity available to unaffiliated programmers.[47] Simply put, it is extremely difficult for an MVPD to risk the investment and recover the substantial costs of constructing and operating a hardwire overbuild (much less turn a reasonable profit) if it must surrender control of the majority of its channel capacity to unaffiliated parties. OVS systems, like franchised cable systems, are already required to reserve channels for must-carry and PEG channels; unlike franchised cable systems, however, they are subject to numerous nondiscrimination obligations.[48] Under these circumstances BellSouth has little incentive to abandon franchised cable service in favor of the OVS model, since the requirement that OVS systems set aside two-thirds of their channels for

---

[45] 47 U.S.C. § 653(c)(1)(C).

[46] *See* pp. 2-3 *supra*; Americast Complaint at 2 ("Ameritech is a wireline cable overbuilder which holds franchises in 76 communities having a total population of more than 2.8 million people living in approximately 1.2 million homes. Ameritech currently operates cable systems in 54 communities in the Chicago, Illinois area; the Cleveland, Ohio area; the Columbus, Ohio area, and the Detroit, Michigan area.").

[47] 47 U.S.C. § 653(b)(1)(B) ("[I]f demand exceeds the channel capacity of the open video system, [the Commission shall] prohibit an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system . . . ."). *See also* "ABA Panel Says Cable Competition is Slowed By Federal Policies," *Communications Daily* (Sept. 22, 1997) [citing control over channels as a reason for Ameritech's decision to deploy franchised cable service].

[48] 47 U.S.C. § 653(c)(1)(B).

unaffiliated programmers is far more onerous than a franchised cable operator's corresponding set-aside obligations under the commercial leased access rules.[49/]

Accordingly, BellSouth recommends that the Commission report to Congress that the current regulatory framework for OVS has yet to generate substantial interest in the OVS model, and that most consumers are unlikely to receive the benefits of OVS unless the 1996 Telecom Act is amended to provide local exchange carriers, as well as incumbent cable operators, with more incentives to adopt the OVS mode of operation in lieu of franchised cable service. To that end, the Commission should ask Congress to amend the 1996 Telecom Act to eliminate the "two-thirds" set-aside requirement for OVS operators, and to grant the Commission authority to adopt OVS channel set-aside requirements that are more in line with the commercial leased access capacity requirements imposed on franchised cable operators.[50/]

Under this revised regulatory framework, the distinguishing characteristics of the OVS model would be retained, *i.e.*, the OVS operator would not be required to obtain a franchise provided that it does not discriminate among video programming providers with regard to

---

[49/] Under Section 612(b) of the 1984 Cable Act (47 U.S.C. § 532(b)), a cable operator is only required to set aside a maximum of 15% of its activated channels for leased access.

[50/] In this regard, it should be noted that the public interest objectives of the OVS set-aside requirement and the commercial leased access rules essentially are the same. *Compare OVS Second R&O*, 11 FCC Rcd. at 18224 ("[B]y requiring open video system operators to provide carriage opportunities for video programming providers on terms that are just and reasonable, . . ., Congress sought to foster competition by encouraging multiple programming sources on open video systems."), with *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access,* 12 FCC Rcd. 5267, 5272 (1997) [stating that the purpose of leased access is "to assure that the public has access to the widest possible diversity of information sources carried on cable systems, and to promote competition in the delivery of diverse sources of programming."].

carriage, charges "just and reasonable" rates for such carriage, and otherwise complies with the other OVS requirements set forth in the 1996 Telecom Act.[51] The only difference would lie in the number of channels that the OVS operator must set aside for unaffiliated programmers, which, for the reasons stated above, should be comparable to the capacity set-aside requirements for commercial leased access to ensure that OVS becomes a legitimate option for BellSouth and others; to the ultimate benefit of consumers. Moreover, harmonizing the OVS capacity set-aside requirement with the commercial leased access capacity set-aside requirement would provide existing cable operators, including incumbents and overbuilders, with a realistic migration path from the cable regulatory model to OVS model. An existing cable operator effectively is precluded from making this transition at the end of its franchise term, since at least half of the OVS set-aside capacity is already programmed by the cable operator and not subject to commercial leased access restrictions.

III. CONCLUSION.

In recent testimony before Congress, Chairman Kennard made the following statement:

> [L]et's not lose sight of the fact that competition is emerging. We're seeing phone companies retool and redesign their networks to deliver sufficient broadband capability to meet the needs of the digital marketplace. At the same time, cable companies are doing much the same in a race to see which industry can deliver an affordable product to the market. There really was a vision

---

[51] 47 U.S.C. § 653(b)(1). Moreover, fees to local governments would not be affected, since the OVS provider would still be required to pay a "right of way" fee comparable to the franchise fee paid by the incumbent cable operator. 47 U.S.C. § 653(c)(2)(B).